APPENDIX — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING MOTION OF STATE OF WATER RESOURCES CONTROL BOARD AND CALIFORNIA UNDERGROUND STORAGE TANK CLEANUP FUND FOR STAY OF PROCEEDINGS PENDING APPEAL DATED AND FILED DECEMBER 15, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 97-4724 DT
CONSOLIDATED WITH
CASE NO. CV 96-8324 DT

(BANKRUPTCY COURT CASE NUMBER LA 92-39039 SB;
JOINTLY ADMINISTERED WITH LA 92-39042 SB)

APPEAL FROM:
ADV. NO. LA 96-01575 SB
CONSOLIDATED WITH
ADV. NO. LA 96-02281 SB

IN RE

GARY LAZAR AND DIVINE GRACE LAZAR,

Debtors,

IN RE

CALIFORNIA TARGET ENTERPRISES INC., ET AL,

Debtors,

Appendix

GEORGE E. SCHULMAN, CHAPTER 7 TRUSTEE,

Appellant,

vs.

STATE OF CALIFORNIA; CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.

Appellee

ORDER **GRANTING** MOTION OF STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA UNDERGROUND STORAGE TANK CLEANUP FUND FOR STAY OF PROCEEDINGS PENDING APPEAL

[CV 97-4724]

I. Background

A. Factual Background

The underlying bankruptcy cases are nine substantively consolidated cases filed by corporations under the control of Divine Grace Lazar and Gary Lazar, administered along with the Lazar's personal bankruptcy cases. The Lazars and their entities held interests in about 200 retail gasoline stations. George Schulman (the "Trustee") was appointed as the Chapter 11 Trustee in 1994, and the next year the cases were converted to Chapter 7 cases. Mr. Schulman was then appointed as Chapter 7 Trustee. The Lazars are currently serving prison sentences for environmental crimes in

connection with operation of the gasoline stations. The tanks at those stations appeared to be older and prone to leakage, a major environmental hazard. The California Underground Storage Tank Cleanup Fund (the "Fund"), which is administered by the State Water Resources Control Board ("SWRCB"), assists gas station owners with costs of corrective action for such environmental hazards.

B. Procedural Posture

On July 9, 1997, this Court issued an Order consolidating the appeals in CV 97-4724 DT, an appeal from Adversary No. LA 96-02281 ("Tax Adversary"), and CV 96-8324 DT, an appeal from Adversary No. LA 96-01575 ("Mandamus Adversary"). The Tax Adversary was originally commenced by the Trustee against the SWRCB and other defendants seeking subordination of claims, damages, and recovery of allegedly improper payments. The Tax Adversary incorporated the Mandamus Adversary, which was an earlier Petition for Administrative Mandamus or Other Alternative Writ that the Trustee had filed to resolve a dispute regarding the SWRCB's decision to deny twenty claims brought upon the Fund by the debtors.

In the Tax Adversary, the Trustee appealed the June 6, 1997 Order of the bankruptcy court denying his Motion for Summary Judgment. The issues on which the Trustee sought Summary Judgment were: (1) are fees paid into the Fund by service station owners "taxes" for bankruptcy purposes?; (2) is the Fund an arm of the State of California that is entitled to assert Eleventh Amendment sovereign immunity?

Appendix

In the Mandamus Adversary, the SWRCB appealed the November 27, 1996 Order of the bankruptcy court denying remand of the administrative mandamus proceedings to state court. The issues on appeal in the Mandamus Adversary were: (1) may a state court proceeding appealing the SWRCB's denial of Fund claims properly be removed to the bankruptcy court; (2) assuming the Fund is entitled to sovereign immunity under the Eleventh Amendment, has the Fund waived that immunity in this case?

By order entered October 1, 1997 (the "October 1, 1997 Order"), this Court (1) reversed in part and affirmed in part the bankruptcy court's order denying the Trustee's motion for partial summary judgment in the Tax Adversary; and (2) affirmed the bankruptcy court's order denying the SWRCB's motion for abstention or remand of the Trustee's mandamus action in the Mandamus Adversary.

On September 29, 1997, the SWRCB filed its Notice of Appeal in case number CV 97-7172. In that case, the SWRCB appeals from an order entered August 28, 1997 in the Mandamus Adversary granting the Trustee's Petition for a Writ of Mandate and denying the SWRCB's Motion for Judgment on the Pleadings or in the Alternative To Limit Evidence to the Administrative Record.

On or about October 30, 1997, the SWRCB and the Fund filed with the Court of Appeals for the Ninth Circuit their Notices of Appeal of this Court's October 1, 1997 Order. Also on or about October 30, 1997, the Trustee filed a Notice of Appeal in which the Trustee appeals from that portion of the October 1, 1997 Order determining that fees paid into the Fund are taxes for purposes of bankruptcy law.

Appendix

On November 7, 1997, the SWRCB filed its Motion for Stay of Orders Pending Appeal.[1] In that Motion, the SWRCB seeks to stay all proceedings in the Mandamus Adversary and the Tax Adversary pending the resolution of the SWRCB's appeal to the Ninth Circuit. That Motion is before the Court today.

II. Discussion

The SWRCB seeks a stay of proceedings in the Tax Adversary and the Mandamus Adversary pursuant to Federal Rule of Appellate Procedure 8. Rule 8 provides that an "[a]pplication for a stay of the judgment or order of a district court pending appeal . . . must ordinarily be made in the first instance in the district court."

The parties disagree as to the standard by which this Court must determine whether to stay the proceedings. In support of the present Motion, the SWRCB cites *Goshtasby v. Board of Trustees of Univ. Of Ill.*, 123 F.3d 427, 428 (7th Cir. 1997), in which the Seventh Circuit held that a district

1. The present Motion seeks to effectuate a stay of this Court's October 1, 1997 Order in the consolidated appeals in cases number CV 96-1575 and CV 97-4724. In addition, the SWRCB seeks to stay the order of the bankruptcy court that is the subject of a bankruptcy appeal currently pending before this Court as case number CV 97-7172. This Court notes that the SWRCB failed to file separate copies of the present Motion under each of the case numbers at issue. In so doing, the SWRCB has created a great deal of administrative inconvenience for this Court, which keeps separate files for each case. Future failure by the SWRCB to comply with the Local Rules regarding presentation of documents to the Court will result in such noncomplying documents being returned to the SWRCB.

court must stay proceedings during the pendency of a nonfrivolous interlocutory appeal involving Eleventh Amendment immunity. In opposition to the present Motion, the Trustee argues that the proper standard is the general standard under Federal Rule of Appellate Procedure 8, which looks to (1) the strength of the appellant's position on appeal; (2) the irreparable injury risked by denial of a stay; (3) whether the stay would substantially harm other parties to the litigation; and (4) that the public interests favor a stay. *Securities Investor Protection Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960 (10th Cir. 1992).

This Court agrees with the SWRCB. The parties agree that the Ninth Circuit may properly consider whether the Fund and the SWRCB are entitled to claim Eleventh Amendment sovereign immunity.[2] In *Goshtasby*, the Seventh Circuit held that a nonfrivolous interlocutory appeal from a denial of sovereign immunity required a district court to stay proceedings pending resolution of the appeal on its merits. *Goshtasby*, 123 F.3d at 428-29. The facts in Goshtasby thus bear a striking resemblance to the case(s) at bar.

This Court finds the rationale of *Goshtasby* to be compelling. The purpose of the Eleventh Amendment is to provide the States with sovereign immunity against

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2. The Trustee correctly points out that the SWRCB's appeal of its Eleventh Amendment immunity claim is taken pursuant to the so-called "collateral order doctrine." *See Puerto Rico Aqueduct*, 506 U.S. at 147, 113 S. Ct. at 689. In light of *Goshtasby*, which also involved an appeal under the collateral order doctrine, it appears to be irrelevant to the propriety of a stay whether the SWRCB's appeal is taken under the collateral order doctrine, or as an appeal of right.

unconsented suits. *See Puerto Rico Aqueduct*, 506 U.S. at 146, 113 S. Ct. at 689, comparing public officials' claims of absolute or qualified immunity, to the sovereign immunity enjoyed by the States, the Seventh Circuit noted, "if the defendant [public official] is correct that it has immunity, its right to be free of litigation is compromised, and lost to a degree, if the district court proceeds while the appeal is pending. Just so with an appeal by a [S]tate under the [E]leventh [A]mendment." *Goshtasby*, 123 F.3d at 428. "[T]he value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145, 113 S. Ct. at 688.

In opposition to the present Motion, the Trustee argues that a stay pending possible resolution by the Ninth Circuit of the Eleventh Amendment issue will result in harm to the Trustee, since the Trustee cannot close the underlying bankruptcy actions until all pending proceedings are resolved. This Court recognizes that a stay could result in a long delay in the distribution of Estate assets. However, a final determination of the SWRCB's Eleventh Amendment claim is an essential prerequisite to making a proper, equitable distribution of those assets.

Finally, the Trustee argues that this Court should make it a condition of any stay that the SWRCB give a bond pursuant to Federal Rule of Appellate Procedure 8(b). This Court finds no reason to believe that the monies contained in the Fund will be exhausted during the pendency of the SWRCB's appeal to the Ninth Circuit. Hence, no bond should be required.

For the foregoing reasons, this Court **GRANTS** the SWRCB's Motion for Stay of Proceedings Pending Appeal. The October 1, 1997 Order of this Court is hereby stayed pending the resolution of the SWRCB's appeal of its Eleventh Amendment immunity claim. This Court further orders that all proceedings in the Mandamus Adversary, No. 96-01575, and the Tax Adversary, No. 96-02281, be similarly stayed pending the resolution of the SWRCB's appeal.

IT IS SO ORDERED.

DATED: DEC 15 1997

[stamp] DICKRAN TEVRIZIAN
Dickran Tevrizian, Judge
United States District Court